IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 1 OF 2002.

Shri Madhukar Kubal,
r/o Post Ibrahampur,
Sattari, Goa. ... Appellant.

Versus

State through Public
Prosecutor. ... Respondent.

Mr. S.G. Bhobe, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 10th July 2003.

ORAL JUDGMENT.

The appellant/original accused, who was convicted by the Additional Sessions Judge, Panaji, by Judgment, dated 13th December 2001, in Sessions Case No. 4 of 1998, for an offence punishable under Section 306 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 3 years, has filed the present appeal challenging the aforesaid conviction and sentence.

2. The facts as are necessary for the decision of the appeal are set out hereunder:-

P.W.21 P.I. Devu Banaulikar was Officer-in-Charge of Panjim Town Police Station in the year 1997. On 3rd October 1997, at 0.5 hours, he

received a wireless message from P.S.I. of Goa Velha informing him that one lady Megali alias Shobana Kubal, aged 30 years, resident of Altinho, Panaji, was brought dead to Casualty Department of Goa Medical College, Bambolim and he was requested to take further action. The wireless message is at Exhibit P.W.21/A. P.S.I. Salim P.W.19 left for Goa Medical College for inquiry. P.W.19 P.S.I. Salim contacted P.W.5 Ramkrishna Pednekar, father of deceased Megali. Police guards were placed at the residence of the deceased. At 8.00 a.m. P.W.5 Ramkrishna lodged his complaint at Exhibit P.W.5/A. On the basis of the said complaint, an offence, vide Crime No. 192/97, under Section 302 of the Indian Penal Code was registered against the appellant/accused. P.W.19 Salim then conducted the scene of offence panchanama at Exhibit P.W.1/A in the presence of P.W.1 Prashant Naik and another panch witness. The appellant/accused came to be arrested at 10.45 a.m.. Since the accused had injuries on his hand, he was referred to the Goa Medical College for treatment. Then P.W.21 P.I. Banaulikar conducted the inquest panchanama vide Exhibit P.W.2/C in the presence of P.W.2 Gurudas Toraskar and another witness. Vide Exhibit P.W.2/B a gunny bag, which was wrapped round the body of the deceased Megali was attached. P.W.17 Dr. E. Rodrigues conducted the postmortem on the body of Megali and by his report, at Exhibit P.W.17/A, he opined

that the cause of death was as a result of extensive burns caused by flames. Vide Exhibit P.W.14/A, the Superintending Engineer was requested to draw up the sketch map of the scene of offence. Accordingly, the sketch, at Exhibit P.W.14/B was drawn by P.W.14 Narendra Naik. In the presence of P.W.3 Ravindranath Virnodkar, vide Exhibit P.W.3/A, the specimen finger impressions of the appellant/accused were obtained. A letter was received from the C.I.D. Crime Branch stating that on the bottle, which was attached from the scene of offence, three finger prints were noticed. It appears that the finger prints on the bottle did not match with specimen finger impressions of the accused. After the receipt of the report of the Chemical Analyser, at Exhibit P.W.21/B, and after completion of the investigation, P.W.21 P.I. Banaulikar filed a charge-sheet against the appellant/accused.

3. Initially a charge under Section 302 of the Indian Penal Code had been framed by the learned trial Court against the appellant/accused. The learned trial Court by its Judgment, dated 29th February 2000, found that the offence under Section 302 of the Indian Penal Code was not made out against the appellant and, therefore, convicted him for an offence under Section 306 of the Indian Penal Code. The appellant/accused, being aggrieved by the aforesaid conviction and

sentence, filed an appeal to this Court and this Court allowing the appeal had remanded the case to the learned trial Court for framing a charge under Section 306 of the Indian Penal Code. On the matter being remanded to the learned trial Court, the learned trial Court, vide Exhibit 55, framed a charge against the appellant for an offence punishable under Section 306 of the Indian Penal Code. The accused pleaded not guilty to the said charge and claimed to be tried. The prosecution, in support of its case, examined 23 witnesses. The accused stepped into the witness box and examined himself as D.W.1.

4. Admittedly, the marriage between the accused and the deceased Megali was solemnized on 16th May 1990. Deceased Megali succumbed to her burn injuries on 2nd October 1999. The presumption under Section 113A of the Evidence Act, therefore, would not be applicable to the facts of the present case. The evidence of the prosecution witnesses can be divided into two categories, namely, the first category consisting of the relations of the deceased and the second category consisting of the neighbours. In the first category, the evidence which is material is that of P.W.5 Ramkrishna, P.W.6 Mandar, P.W.8 Hemantshekhar and P.W.15 Hemani. In the second category, the evidence which is material is of P.W.4 Chandrakant, P.W.7 Ramdas, P.W.10 Silvester, P.W.11 Rekha, P.W.13 Charushila, P.W.22

Simitra and P.W.23 Saksha.

5. P.W.5 Ramkrishna in his evidence states that the accused is the husband of his daughter Shobana. They have two sons by name Mandar and Milind. After about 6 months of marriage, the accused had come to his house and had told him that P.W.5 Ramkrishna should take his daughter to his place. The accused was in an angry mood when he had come to his house. He then states that he had learnt that his daughter was suspecting that the accused was having an affair with another lady and on account of that there used to be quarrels between the accused and his daughter. He states that he learnt about this from some people. He further states that his wife had gone to the house of the accused to tell the accused and his daughter to live peacefully. He also states that his daughter was sometimes telling him that the accused used to come late and sometimes used to beat her. He has also admitted that he used to visit the house of the accused but his son P.W.8 Hemantshekhar was visiting the house of the accused very often.

6. On 2nd October 1997, at about 10.00 p.m., one of the neighbours of the accused came to his house and took his son P.W.8 Hemantshekhar to the house of the accused stating that his daughter Shobana was sick. P.W.8 Hemantshekhar returned within 10 minutes and

informed P.W.5 Ramkrishna that Shobana was burnt. Upon receipt of the information, P.W.5 Ramkrishna, his wife and his son went to the house of his daughter and, thereafter, in a vehicle the deceased was taken to the hospital. Accordingly, he filed his report at Exhibit P.W.5/A. In the cross-examination, he has admitted that he was working in the Police Department as a barber for 10 to 15 years and had retired from service in the year 1996. He has also admitted that the marriage of Shobana and the accused was a love marriage. He has also admitted that he had opposed the love affair of his daughter Shobana with the accused. He has also admitted that all the religious formalities in respect of the marriage of his son Hemantshekhar were done by the accused. He has further admitted that he is not aware whether his son Hemantshekhar had obtained a loan from the Goa Urban Co-operative Bank and that the accused had stood surety for him. Similarly he has also stated that he is not aware if his son Hemantshekhar had obtained a loan from the Karnataka Bank. He has, however, admitted that subsequently he came to know that the accused had stood surety for him. He has also admitted that the accused had received notices from the Karnataka Bank as his son P.W.8 Hemantshekhar had not repaid the loan. Lastly he has admitted that he came to know from his family members that deceased Shobana had visited P.W.8 Hemantshekhar. He has also admitted that his daughter

Shobana was emotional. Certain omissions have been brought out qua his report. He has admitted that he had not stated to the Police that the accused was in an angry mood when he had come to his house after about 6 months of the marriage to tell him to take his daughter home. Omission is also brought out in respect of P.W.5 Ramkrishna having learnt from people that deceased Shobana was suspecting that the accused was having illicit relations with another lady. Omission is also brought out in respect of his statement that deceased Shobana was sometimes telling him that the accused used to come home late and used to beat her. He had further admitted that soon after the incident the sons of the accused, namely, Mandar and Milind are in his custody.

7. P.W.8 Hemantshekhar, brother of deceased Shobana, states that the marriage of the accused with his sister Shobana was a love marriage and was solemnized in the month of May 1990. Within one year of the marriage Shobana came to their house and requested for some money stating that the accused was in need of money. P.W.8 Hemantshekhar informed Shobana that, since he had no money, he could not lend her any money and also informed her that he would tell P.W.5 Ramkrishna about her difficulties. He further states that he accordingly informed his father. P.W.5 Ramkrishna was initially not inclined to give money to Shobana but,

because of the intervention of Shobana's mother, P.W.5 Ramkrishna gave an amount of Rs. 1,500/- to Shobana. He has further stated that he started residing in the house of Shobana and stayed in her house for a period of one year. He further states that during this period Shobana had on many occasions sent him to find the whereabouts of the accused whenever the accused was late in coming to the house. He has further stated that after two years of marriage Shobana used to tell him that the accused was harassing her and was beating her on the slightest pretext. He further states that he was informed by one Silvester that his sister was beaten and, therefore, he went to the house of his sister alongwith his wife at about 10.30 a.m. and found that Shobana had sustained injuries on her face near the nose. He had taken Shobana to one doctor named Govind Kamat for treatment. After taking treatment from Dr. Kamat, he had taken Shobana to Porvorim and has asked his sister to show the house of the lady with whom the accused was having illicit relations. Shobana told him that accused would harass her more and, therefore, they came back home. He has also stated that on return of the accused, he had asked the accused as to why he was harassing Shobana and the accused is alleged to have replied that Shobana was a 'trouble maker' and that P.W.8 Hemantshekhar should take her to her parent's place. He further states that in the year 1996, during

Ganesh Festival, Shobana had disclosed to him that she was beaten by the accused in the presence of the family members of the accused. On 2nd October 1997, Shobana had come to the house of P.W.8 Hemantshekhar and had left after about half an hour. On the same day, the neighbour of the accused one Silvester had come to their house at about 10.15 p.m. and had told P.W.8 Hemantshekhar to come immediately. P.W.8 Hemantshekhar had gone to the house of Shobana and had found that she had sustained burn injuries. Thereafter, Shobana was shifted to the hospital, where she was declared dead.

8. In the cross-examination P.W.8 Hemantshekhar has admitted that his statement was recorded by the police eight days after the incident. He has further admitted that he was working in the Office of Unit Trust of India and, on account of mis-appropriation of funds, he was placed under suspension. Ultimately, he had submitted his resignation, though under pressure. He had purchased a rickshaw in 1994 and the accused stood as surety for the loan which P.W.8 Hemantshekhar had obtained from the Goa Urban Co-operative Bank. P.W.8 Hemantshekhar has admitted that he has not repaid the said loan. He has also admitted that from the year 1995 the accused was receiving notices from the Bank on account of non-payment of loan. He has also admitted that in February 1998, proceedings for recovery

of the loan have been initiated by the Bank against him and the accused. He has also admitted that he has not stated in his statement that after about one year of the marriage, Shobana had come to their house and had requested for money stating that the accused was in need of money. He has also admitted that he had not stated in his statement that he informed his sister that he was not having money at that time and, therefore, would tell his father about her difficulty. He has also admitted not to have stated in his statement that initially his father P.W.5 Ramkrishna did not want to give money to Shobana but, because of the intervention of his mother P.W.5 Ramkrishna gave an amount of Rs. 1,500/- to Shobana. Similarly, omission was brought out regarding the stay of P.W.8 Hemantshekhar at the house of Shobana for a period of one year. Similarly, omission is brought out from the statement of this witness that after two years of marriage Shobana used to tell him that the accused was harassing her and was beating her on slightest pretext. Similarly, omission was brought out from his statement that the neighbour of accused by name Silvester and his wife were telling him that Shobana was beaten by the accused. He is admitted not to have stated in his statement about Silvester informing him that Shobana was beaten by the accused and his going to the house of Shobana and noticing the injury near the nose of Shobana. Omission is also

brought out in respect of this witness taking Shobana to Dr. Kamat as also this witness asking Shobana to show the house of the lady with whom the accused was having illicit relations and Shobana stating that the accused would harass her more. P.W.8 Hemantshekhar has admitted not to have stated in his statement about his asking the accused as to why he was harassing Shobana and the accused stating that Shobana was a trouble maker. He has admitted not to have stated in the statement about the incident of assault during Ganesh Festival of 1996. He has admitted that the two sons of the accused, namely, Mandar and Milind, were staying with him. A suggestion was put to him, which was denied by him, that Shobana had come to their house on 2nd October 1997 to demand money to pay off the loan of the Bank, which he had obtained. P.W.8 Hemantshekhar further denied that he had refused to give any money and had quarrelled with Shobana on that day.

9. P.W.15 Hemani is the wife of P.W.8 Hemantshekhar. She has stated that when she used to visit Shobana, Shobana used to tell her that the accused was assaulting on the ground that insufficient gold ornaments had been given at the time of marriage. Shobana had also told her that the accused was moving with one lady named Charushila of Porvorim. She has further stated that in 1996 Shobana had informed her

that the accused had assaulted her and so also the neighbour Silvester had informed her that the accused was assaulting Shobana. She states that during one of her visits, she had noticed that the face of Shobana was swollen and blood was oozing from her nose. On seeing this, she had asked Shobana as to what had happened and Shobana had replied that when she had asked the accused as to why he was moving with Charushila, the accused had assaulted her. She has further stated that on one occasion, when the accused was admitted in the hospital, Shobana had informed her that Charushila had come to visit the accused. She has further stated that, on 16th September 1997, Shobana had come to their house and had informed her that she had not eaten for the last two days as she had told the accused that she would not eat anything till the accused stopped visiting the house of Charushila. She then speaks about the visit of Shobana on 2nd October 1997 and then Silvester coming about 10.30 a.m. informing that Shobana was not well.

10. In the cross-examination she has admitted that the marriage of Shobana with accused was a love marriage and there was an objection by P.W.5 Ramkrishna to the solemnization of the marriage. She has denied the suggestion that on 2nd October 1997 Shobana had come to their house requesting P.W.8 Hemantshekhar to pay off the loan and on refusal of P.W.8 Hemantshekhar to pay

off the loan, there was a quarrel between P.W.8 Hemantshekhar and Shobana. Omission was brought out in the cross-examination regarding her visit to the house of Shobana and finding the face of Shobana swollen. She admits not to have stated to the police that she had inquired with Shobana as to what had happened and to Shobana stating that the accused had assaulted her as she had asked the accused about moving about with Charushila. Omission was also brought out in respect of Shobana telling this witness that Charushila had come to visit the accused in the hospital.

11. The prosecution has examined P.W.6 Mandar, son of the accused, who, at the time of his examination, was 7 years old. He states that, on the day of the incident, his father had taken him to Porvorim to the house of one aunty. He states that he was watching T.V. while the accused had gone and brought the said aunty. The daughter of that lady had given some stickers to P.W.6 Mandar and the deceased had asked Mandar as to who had given him the stickers. Deceased also asked the accused as to where they had gone. He states after taking his meals, the accused assaulted the deceased severely with kicks and the assault was on account of the aunty of Porvorim. He further states that he woke up on account of the smell of burning and he found his mother in flames. When the flames lessened in their

intensity, the accused extinguished the fire with the help of a floor mat. In the cross-examination he has admitted that after the death of Shobana, the police had visited on two to four occasions. When the police came to meet him, he was residing in the house of his maternal uncle P.W.8 Hemantshekhar. Omission was brought in respect of the deceased asking the accused as to where he had gone and the accused not replying anything. Similar omission is brought out in respect of the accused assaulting the deceased by means of kicks. He has also admitted not to have stated in his statement that the assault was on account of the aunty of Porvorim. Similar omission is brought out in his Section 164 Statement regarding the accused assaulting the deceased with kicks. Omission was also brought out from his statement that the accused was standing at the main door and was not allowing anyone to enter the house. This witness has admitted not to have stated that the accused was beating the deceased with a cricket bat. He has admitted that in the evening of the day of the incident, he, his brother and his deceased mother had gone to the house of P.W.8 Hemantshekhar.

12. Thus, from the evidence of P.W.5 Ramkrishna, P.W.6 Mandar, P.W.8 Hemantshekhar and P.W.15 Hemani, it is seen that the evidence in respect of the ill-treatment, which the accused is alleged to have

given to the deceased Shobana, is not spelt out at all. The versions of these witnesses regarding ill-treatment is extremely discrepant and most of the incidents of ill-treatment alleged to have been disclosed by the deceased to them have been established as omissions. These omissions are on vital aspect of the prosecution case and, therefore, cannot be ignored. However, one thing is apparent from the evidence of these witnesses that, though the relations between the deceased and the accused were not strained, there appear to be some bickerings between the deceased and the accused. However, the prosecution has not been able to establish beyond reasonable doubt a singular instance of assault by the accused on the deceased.

13. The prosecution has examined P.W.10 Silvester, who states that he was residing in a quarter just 10 minutes away from the house of the accused. He states that on 2nd October 1997 between 10.00 to 10.30 p.m. he heard some noise and went to the house of the accused, where he learnt that the deceased had sustained burnt injuries. He further states that on the request of the accused, he went to the house of P.W.8 Hemantshekhar and called him to the house of the accused. He has further admitted "I do not know how was the relationship between the accused and his wife. I never told Hemant anything about the relationship between the accused and his

wife". This witness was not cross-examined on behalf of the prosecution and, therefore, the assertion of P.W.8 Hemantshekhar and P.W.15 Hemani that this witness had informed them about the accused beating his wife, according to me, cannot be relied upon.

14. Prosecution has examined P.W.4 Chandrakant Naik, who was residing in the same colony as that of the accused. He states that on 2nd October 1997 his wife informed him that there was a fire in the house of the accused. He asked the accused as to what had happened and the accused had replied that his wife was burnt. The accused requested him to arrange a vehicle to take deceased Shobana to the hospital. This witness was declared hostile and was cross-examined by the prosecution, but, nothing worthwhile in support of the prosecution case has emerged from the cross-examination. In the cross-examination on behalf of the accused he has admitted that the relations between the deceased and the accused were good.

15. P.W.7 Ramdas states that a few days prior to her death, the deceased was heard telling on telephone that the accused used to assault her in case she asked the accused the reason for coming home late. He has further stated that he had once asked Shobana as to why she was crying and the deceased had replied that in case

she disclosed the reason, the accused would harass her more. He further states that two days thereafter the deceased had told him that the accused was visiting one aunty at Porvorim, which the deceased was not liking.

16. P.W.11 Rekha, who is also a neighbour of the accused, states that on 2nd October 1997, at about 10.00 p.m., she heard some sound and heard the accused shouting for help. She has stated that she cannot say whether the relations of the deceased with the accused were good or bad. She has stated that sometimes she used to meet the deceased and talk to her.

17. P.W.12 K. Ramanama states that on the day of the incident, at about 10.00 p.m., she heard some noise. On going to the house of the accused, she saw the deceased had fallen down. She got frightened and returned home.

18. A perusal of the evidence of the neighbours of the accused does not conclusively establish that the accused was ill-treating the deceased. It appears that the relations between the accused and the deceased had soured slightly on account of the deceased suspecting the accused of having illicit relations with a lady at Porvorim.

19. The prosecution has examined P.W.13 Charushila, the lady from Porvorim with whom the accused is alleged to have had illicit relations. She states that she lost her husband in August 1997. The accused was a friend of her husband for many years. The accused used to visit when her husband was living. On behalf of the prosecution nothing is put to this witness nor was it suggested to her that the accused was having any illicit relations with her.

20. The prosecution has examined P.W.23 Saksha, daughter of P.W.13 Charushila. She states that she is studying in an Engineering Course and she has known the accused as he was her father's friend. She states that the accused had come to her house last when her father expired and, thereafter, the accused had not come to their house. She states prior to the death of the deceased, the accused did not come to their house. She specifically states that the accused did not visit their house in the month of October. This witness was declared hostile by the prosecution and was cross-examined, but, again, nothing worthwhile emerged from the cross-examination.

21. The learned trial Court on the basis of the evidence of P.W.5 Ramkrishna, P.W.6 Mandar, P.W.8 Hemantshekhar and P.W.15 Hemani, came to the conclusion

that the prosecution had established that the accused was having illicit relations with P.W.13 Charushila and on account of which there used to be quarrels between the deceased and the accused and the accused used to assault the deceased Shobana. The learned trial Court, therefore, held that the conduct of the accused created mental tension/torture, due to which the deceased committed suicide. The learned trial Court came to the conclusion that the accused on account of his illicit relations with Charushila had abetted the suicide.

22. From the evidence of the relatives of the deceased it is clear that the prosecution has not succeeded in proving that the accused had illicit relations with P.W.13 Charushila. At the most the prosecution has been successful in proving that deceased Shobana suspected the accused of having illicit relations with P.W.13 Charushila. P.W.13 Charushila, when examined by the prosecution, was not questioned about the accused having illicit relations with her. In fact, no suggestion had been put on behalf of the prosecution to that effect. All that the prosecution has been able to prove is that the relations between the accused and the deceased were soured on account of the deceased Shobana suspecting that the accused was having illicit relations with P.W.13 Charushila. The prosecution has utterly failed to prove that on account

of this, the accused was ill-treating the deceased Shobana. Not much weight can be attached to the evidence of P.W.6 Mandar, who, apart from being a child witness, was residing with P.W.5 Ramkrishna and P.W.8 Hemantshekhar, when his statement came to be recorded. It would be extremely hazardous to come to a conclusion only on the basis of the evidence of P.W.6 Mandar without being corroborated by the evidence of other independent witnesses. P.W.10 Silvester has denied having ever informed to the relatives of the deceased that the accused was ill-treating deceased Shobana. Thus, in the face of such discrepant evidence, it is not possible to arrive at a finding that the accused was either having illicit relations with P.W.13 Charushila or that the accused used to beat deceased Shobana on account of that.

23. The accused has examined himself as D.W.1. He has stated that his marriage with deceased Shobana was a love marriage and there was objection to their marriage from the relatives of Shobana. He has stated that he has stood surety for the loan taken by P.W.8 Hemantshekhar and since P.W.8 Hemantshekhar had not repaid the loan, he was served with notice from the Goa Urban Co-operative Bank. He states that, on 16th September 1997, he had received a notice from the Bank, which notice is at Exhibit D.W.1/A, calling upon him to

pay the amount within 10 days, failing which, the amount would be deducted from his salary. He further states that on 2nd October deceased Shobana came from P.W.8 Hemantshekhar's house at 6.30 p.m. and he saw that she was upset and he inquired with her the reason and Shobana had disclosed to him that P.W.8 Hemantshekhar had insulted her saying that he would not repay the loan. He further states that when he was in the toilet he heard the screams of Shobana and he saw that Shobana was engulfed in flames. He further states that he had extinguished the fire with the help of a floor mat. In the cross-examination, on behalf of the Public Prosecutor, he has admitted that he was earlier married to one Christian lady, whom he had divorced. He has stated that he knows Charushila and has denied that he used to visit her. He has denied that on 2nd October he alongwith P.W.6 Mandar had gone to the house of P.W.13 Charushila. There is nothing in the cross-examination, on behalf of the prosecution, to discredit what the accused has stated on oath.

24. The learned Single Judge of this Court in **Shankar Mangelal Lokhande v. State of Maharashtra,** 2000 (3) Mh.L.J. 524 has held that in order to prove the charge of abetment the accused must have instigated a person to commit suicide or intentionally aided the deceased to commit suicide. The two terms "instigates"

and "intentionally aids" used in Section 107 of the Indian Penal Code would necessarily require mens rea on the part of the accused in order to hold him guilty of abetment for committing suicide under Section 306 of the Indian Penal Code.

25. The Supreme Court in **Sanju alias Sanjay Singh Sengar v. State of M.P.,** (2002) 5 S.C.C. 371 has held that "instigate" denotes incitement or urging to do some drastic action or to stimulate or incite. Presence of mens rea is a necessary concomitant for instigation.

26. From the perusal of the evidence, the prosecution has not been able to establish that the accused had instigated or had intentionally aided the deceased to commit suicide. The conduct of the accused also cannot be said to be a proximate cause for the deceased to have committed suicide. On the contrary it appears from the evidence of the accused that the deceased was disturbed on account of refusal of P.W.8 Hemantshekhar to repay the loan to the Bank, for which the accused had received notices. In such circumstances, according to me, the conviction of the appellant for the offence punishable under Section 306 is wholly unsustainable. Accordingly, Criminal Appeal is allowed. The conviction and sentence of the appellant for an offence punishable under Section 306 of

the Indian Penal Code passed by the Additional Sessions Judge, Panaji, in Sessions Case No. 4 of 1998 is, hereby, quashed and set aside and the appellant/accused is acquitted of the offence with which he was charged and convicted. The bail bond stands cancelled. Fine, if paid, be refunded to the appellant/accused.

(P.V. HARDAS)
JUDGE.

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